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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

LINDA IRENE MEISTER,

Petitioner,

v.

TEXAS ADJUTANT GENERALS DEPARTMENT;
DANIEL JAMES, III, Brigadier General,
in his official capacity as Adjutant General
of the State of Texas

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the status of a plaintiff as a civilian employee of a military department is the determinative factor in considering whether a Title VII claim brought under 42 U.S.C. § 2000e, *et seq.*, is justiciable.

Whether an employer may refuse to comply with applicable law and fail to change its qualifications for a particular position, which consequently prevents the claimant from making a prima facie case in her Title VII claim for failure to promote.

PARTIES TO THE PROCEEDING

Petitioner is Linda Irene Meister. Respondents are the Texas Adjutant General's Department and Brigadier General Daniel James, III.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fifth Circuit opinion (App. A) is reported at *Linda Irene Meister v. Texas Adjutant Generals Department, et al.*, 233 F.3d 332 (5th Cir. 2000). The Magistrate's Report and Recommendation and the district court's opinion approving and adopting the Report and Recommendation (App. B and C, respectively), styled *Linda Irene Meister v. Texas Adjutant Generals Department and Brigadier General Daniel James III* are not reported.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on November 28, 2000. The Court of Appeals entered an order denying a timely petition for rehearing on January 5, 2001 (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the statutory provisions of 42 U.S.C. § 2000e.

Section 2000e-2 (a) states in pertinent part:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

> individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

This case involves the statutory provisions of 42 U.S.C. § 2000e-16.

Section 2000e-16 states in pertinent part:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, ... shall be made free from any discrimination based on race, color, religion, sex or national origin.

This case involves Department of Defense Directives.

Department of Defense Directive 140005 C.1. (March 21, 1983) states in pertinent part:

> It is the policy of the Department of Defense to use civilian employees in all positions that do not require military incumbents for reasons of law, training, security, discipline, rotation, or combat readiness, or that do not require a military background for successful performance of the duties involved.

Department of Defense Directive 140005, 3.27D (d) (March 21, 1983) provides:

> Positions that have been delineated as military:
>
> (1) Commanders, deputy commanders, commandants and executive officers. . . .

> (2) Positions, which by law, treaty, or regulation require a military incumbent. Examples include Staff Judge Advocate. . . . Positions that are required by law include the following: Chief of Staff . . .
>
> * * *
>
> (4) Positions in which current military expertise is required for successful performance of the prescribed duties . . . Positions may not be delineated as military on the principal basis of duties requiring only knowledge of military administrative procedures or similar capabilities. Such knowledge and capabilities are reasonably attainable by civilian employees.

Department of Defense Directive 140005, 3.27D d (3) (March 21, 1983) provides:

> Conversion to civilian incumbency will be accomplished when qualified civilians become available.

Department of Defense Directives 1100.9 (Sept. 8, 1971) provides:

> Management positions are defined to include the responsible officials, and their principle assistants at the division, branch, section, and comparable level and above, for both operating and staff and service functions.
>
> Support activities . . . are those activities . . . of a commercial-industrial type, such as research and development, procurement, . . . and such administrative and professional activities as

budgeting and accounting, legal, medical, personnel administration and public relations.

* * *

Military personnel normally will be assigned to management positions when required by law, when the position requires skills and knowledge acquired primarily through military training and experience, and when experience in the position is essential to enable the officer personnel to assume responsibilities necessary to maintain combat-related support and proper career development. Civilian personnel normally will be assigned to management positions when the specialist skills required are usually found in the civilian economy and continuity of management and experience is essential and can be provided by civilians. . . . Military and civilian personnel assigned to management positions must be qualified by training and experience for such positions and be expected to perform fully the duties of the positions to which assigned.

Department of Defense Directive 1100.4 (August 20, 1954) provides:

Civilian personnel will be used in positions which do not require military incumbents for reasons of law, training, security, discipline, rotation, or combat readiness, which do not require a military background for successful performance of the duties involved, and which do not entail unusual hours not normally associated or compatible with civilian employment.

This case also involves army regulations. Army Regulation AR 570-4, 3.26(b) (September 25, 1989) states in pertinent part:

> Exceptions to civilian incumbency must be held to a minimum. These exceptions must be based on compelling, objective justification that clearly supports a military position identification. When a staff activity requires collective military expertise, a military-civilian team should be established. Duties clearly requiring a military incumbent should be grouped and assigned to a few military positions. The remaining positions should be delineated as civilian.

STATEMENT OF THE CASE

A. Pertinent Facts[1]

Linda Meister was a state civilian employee of the Texas Adjutant General's Department. This department administers the Texas National Guard. Brigadier General Daniel James, III is the head of the department. Ms. Meister was not required to be a member of the Texas National Guard. Nor was she required to be a member of the reserves.

While employed as the Assistant Schools Program Manager/Administrative Technician III supporting the Texas Army National Guard, Ms. Meister was subjected to a hostile work environment by her supervisor because of her gender. Ms. Meister filed a formal complaint and an investigation was undertaken. After the investigation, the department determined that her supervisor had acted improperly.

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1. Pertinent facts are taken from the Record Excerpts filed by Petitioner at the Fifth Circuit Court of Appeals in support of her appellate brief.

Despite that finding, Ms. Meister's supervisor was not transferred to another department until four months after the investigation had been completed. The position of State Schools Program Manager then became available. Ms. Meister sought an opportunity to apply for the position.

The position of State Schools Program Manager is a position that can be classified as a military or civilian position. However, under certain circumstances, it must be classified as a civilian position. If the position is classified as a civilian position, there is no requirement that the individual holding the position also be a member of the military or reserves. Ms. Meister requested that the position be classified as a state civilian position so that she, as a civilian, would be qualified for the position. Ms. Meister subsequently learned that the position had not been reclassified. Six months later, she was involuntarily transferred from her position as the Assistant Schools Program Manager in the Texas Army National Guard Division to Assistant Personnel Manager in the Texas Air National Guard Division.

In February 1998, after suit had been filed, Ms. Meister applied for the position of State Human Resources Manager, Program Administrator IV. There was no requirement that the individual holding this position be a member of the military or reserves. Indeed, the individual that was chosen for this position was not a member of the military or reserves. An objective review of the applications for this position established that Ms. Meister was one of the best-qualified applicants for the position, but she did not receive an interview.

B. Proceedings Below

Petitioner instituted an action seeking compensatory and exemplary damages against the Texas Adjutant General's Department and Brigadier General Daniel James, III (collectively "the employer") for violation of her civil rights under 42 U.S.C. § 2000e. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question). Respondents filed a Motion to Dismiss on the basis that Ms. Meister claims were barred under *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950). Respondents also filed a motion for summary judgment on the merits. The district court granted the Motion to Dismiss in favor of Respondents, finding that Ms. Meister's claims were barred by the *Feres* doctrine.

Petitioner timely appealed this decision. The issues were briefed, and after hearing the argument of counsel, the Fifth Circuit Court of Appeals entered its judgement finding that *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950) did not apply to Ms. Meister's claims because she was a civilian employee. (App. A at 13a-14a). The Court also found that Ms. Meister had failed to make a prima facie case with regard to her Title VII claim that the employer retaliated against her in failing to promote her to State Schools Program Manager because she had failed to show that she was qualified for the position, a position that allegedly required active military personnel. (App. A at 15a).

Finally, the Fifth Circuit determined the application of the *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) in the context of two Ninth Circuit cases concerning claims brought by civilians against the military, *Khalsa v. Weinberger*, 779 F.2d 1393 (9th Cir. 1985) and *Bledsoe v. Webb* 839 F.2d 1357 (9th Cir. 1988). The Fifth Circuit declined to follow *Bledsoe*, because it construed *Bledsoe* to hold that the status of the plaintiff as a civilian was determinative on whether *Mindes* applied. (App A at 18a). The Fifth Circuit then

remanded this matter to the lower court for a determination as to whether the decisions concerning Ms. Meister's remaining two claims were "internal military decisions" to which *Mindes* would apply. (App A at 20a).

Petitioner filed her petition for rehearing on the issue of the failure to make a prima facie case under Title VII and the Fifth Circuit's construction of, and the failure to apply, *Bledsoe v. Webb* to her remaining claims. The petition for rehearing was denied on January 5, 2001.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Fifth Circuit Court of Appeals conflicts with The Decision of the Ninth Circuit Court of Appeals.

The *Mindes* test was adopted by the Fifth Circuit to determine whether a particular internal military decision should be reviewed. *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971).[2] However, the threshold question is whether the decision that gave rise to the Title VII claim is an internal military decision. (App. A at 17a).

The Ninth Circuit held that the decision is not an internal military decision subject to *Mindes* if the plaintiff is a civilian employee of the military department. *See Bledsoe v. Webb*, 839 F.2d 1357 (9th Cir. 1988). The Fifth Circuit in this matter

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2. Under *Mindes*, internal military decisions should not be reviewed in the absence of: (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations and (b) exhaustion of available intra service corrective measures; 453 F.2d at 201. If these two factors are met, then the court must consider (1) the nature and strength of the plaintiff's claim; (2) the potential injury to the plaintiff if review is refused; (3) the extent of interference with military functions; and (4) the extent to which military discretion or expertise is involved. *Id.*

disagreed, finding that the status of the plaintiff as a civilian was not determinative on whether the decision was an internal military decision. (App. A at 18a). In doing so, it explicitly rejected the Ninth Circuit holding in *Bledsoe v. Webb*. (App. A at 17a-18a).

In *Bledsoe v. Webb*, the plaintiff was a civilian employed by a federal military department. She filed suit under 42 U.S.C. § 2000e-16 when she was refused permission to board a naval ship even though she needed to board to complete her job duties. The district court dismissed her claim, holding that under *Mindes*, her claim was nonjusticiable. Plaintiff appealed, arguing that *Mindes* had been applied only to legal challenges brought by military, not civilian, personnel. In reviewing her claim, the Ninth Circuit held that "a Title VII claim brought by a federal civilian employee of a military department and premised on a denial of embarkation exclusively for gender, is justiciable." 839 F.2d at 1360. In reaching its conclusion, the Court relied on the fact that "plaintiff [Bledsoe] is not a member of the 'military services' " and "no policy or function is implicated which is unmistakably military in nature," *Id.* The Ninth Circuit distinguished *Mindes*, because "*Mindes* . . . did not involve civilian plaintiffs employed by a U.S. military department." *Id.*

In determining the application of *Mindes* to Petitioner's claims in this matter, the Fifth Circuit Court of Appeals refused to follow *Bledsoe* because "[w]hether the plaintiff is civilian or a serviceman does not affect whether the issue we are reviewing qualifies as an 'internal military decision'." (App. A at 18a). The Court concluded "we will not forestall the application of *Mindes* simply because Meister is suing as a civilian." *Id.* Accordingly, the Court rejected *Bledsoe* because it construed *Bledsoe* to find that the status of the plaintiff was the determinative factor in the applicability of *Mindes*.

Under the Fifth Circuit decision, a conflict exists between the circuits as to whether the status of a plaintiff is determinative on whether the *Mindes* test is applicable.

Thus, this Court should grant review to resolve the conflict between the circuits and determine whether the status of a plaintiff (civilian or military) is determinative on whether an employer's decision is an internal military decision subject to the *Mindes* test for reviewability for claims brought under 42 U.S.C. § 2000e and § 2000e-16.

II. Whether an employer may refuse to comply with applicable law and fail to change its qualifications for a particular position, which consequently prevents the claimant from making a prima facie case in her Title VII claim for failure to promote.

In its November 28, 2000 opinion, the Court found that Petitioner failed to make a prime facie case in her claim for failure to promote to the Schools Program Manager position. The Court held that Ms. Meister could not show that she was qualified for the position because she was not active military and the position required active military personnel. *See Haynes v. Pennzoil*, 207 F.3d 296, 300-01 (5th Cir. 2000) (Plaintiff must show he is qualified for the position to which he was not promoted). The Court further held that the employer did not have to alter its required qualification that the individual holding the position be an active member of the military on Ms. Meister's request.

However, Department of Defense Directives (DODD) applicable to the Texas National Guard (administered by the Adjutant General's Department) required that the position be designated as civilian. Thus, the qualifications should have been changed, not because Petitioner requested the change, but because the regulations required the change. If the employer had complied with the applicable regulations, it

would have changed the position from military to civilian and Petitioner would have been able to show that she was qualified for the position of State Schools Program Manager.

The Department of Defense Directives are regulations applicable to the military. *See, e.g., United States v. Larionoff*, 431 U.S. 864, 872, 97 S. Ct. 2150, 53 L. Ed. 48 (1977). These regulations govern how the military is run if they do not contradict the underlying statutory authority. *See, e.g., Greene v. Unites States*, 376 U.S. 149, 84 S. Ct. 615, 11 L. Ed. 2d 576 (1964). Moreover, these regulations must be construed as statutes and the rules of statutory construction apply. 376 U.S. at 160. Thus when a clear policy directive is issued, the regulated agency must comply with that directive.

The Texas National Guard as a military agency, governed by federal law, must comply with these regulations.[3] Thus, the Texas Adjutant General's Department had to comply with the clearly articulated policy of the Department of Defense to assign a civilian to a position unless the position is one that requires military training and expertise. *See* DODD 1100.4 (August 20, 1954).

This policy is unequivocally stated in DODD 140005 (March 21, 1983):

> It is the policy of the Department of Defense to use civilian employees in ***all*** positions that do not require military incumbents for reasons of law, training, security, discipline, rotation, or combat readiness, or that do not require a military

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3. *See* appellees' Fifth Circuit Court of Appeals brief at 28. ("Adjutant General is a federal agency as well as state officer, reflecting hybrid state-federal character of the National Guard." (*citing Nesmith v. Fulton*, 615 F.2d 196, 198 (5th Cir. 1980)).

> background for successful performance of the duties involved.

(emphasis added).

An army manpower regulation implements part of the directives by setting forth which positions are military. *See* AR 570-4 (September 25, 1989). This regulation cautions:

> Exceptions to ***civilian*** incumbency must be held to a minimum. These exceptions must be based on compelling, objective justification that clearly supports a military position identification. When a staff activity requires collective military expertise, a military-civilian team should be established. Duties clearly requiring a military incumbent should be grouped and assigned to a few military positions. The remaining positions should be delineated as civilian.

AR570-4, 3.26 (b) (September 25, 1989) (emphasis added). If a qualified civilian is not available, military personnel may be used, but "[c]onversion to civilian incumbency will be accomplished when qualified civilians become available. . . ." DODD 140005, 3.27D d (3). Thus, when a qualified civilian is available, the position **must** be designated as civilian.

Positions that have been delineated as military include positions as commanders,[4] Staff Advocate, Chief of Staff, inspector general, officers, drill sergeants, recruiters and certain positions at the U.S. Military Academy. *See id.* at (d) 1, 2, 3, and 5.

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4. However, the fact that a position requires the supervision of military personnel does not require a military supervisor. *See* AR 570-4, 3.26 c (Sept. 25, 1989).

Another position delineated as military is a position in which current military expertise is required to successfully perform the assigned duties. *Id.* at (d) (4). However, a position cannot be defined as requiring military expertise simply because "of duties requiring . . . a knowledge of military administrative procedures or similar capabilities. Such knowledge and capabilities are reasonably attainable by civilian employees." *Id.* Thus, the fact that a position requires knowledge of military administrative procedures does not justify designating the position as military.

Further, management positions are not reserved for military personnel, especially in support activities such as training. Support activities are defined as activities of "a commercial-industrial type, such as research and development, procurement, . . . and such administrative and professional activities as budgeting and accounting, legal, medical, personnel administration and public relations." DODD 1100.9 (Sept. 8, 1971). The directive limits management positions to military personnel only when "required by law, when the position requires skills and knowledge acquired primarily through military training and experience, and when experience in the position is essential to enable the officer personnel to assume responsibilities necessary to maintain combat-related support and proper career development." *Id.* Otherwise, "[c]ivilian personnel normally will be assigned to management positions when the specialist skills required are usually found in the civilian economy and continuity of management and experience is essential **and can be provided by civilians**." *Id.* (emphasis added).

The State Schools Program Manager is responsible for ensuring training and funds are available for all military occupational skills (MOS) needed within the state. *See RE. 3.* As such this position is a management and administrative position. Indeed, appellees asserted "that the

individual occupying the Schools Manager position would continue to be a person who is on active military status; [] and specifically a Sergeant Major because of the extensive administrative training that SGMs [Sergeant Majors] receive and their experience and knowledge of military education programs." RE 10, p.000736. Respondents emphasized the need for **administrative** knowledge to justify their rationale for keeping the position military. However, A.R. 570.4 3.27 D d (4) explicitly rejects this rationale for keeping a position as military incumbency. Further, Ms. Meister had the experience and knowledge of military education programs having been assistant State Schools Program Managers since May 1993. *See* RE 3. Thus, she was a civilian that could provide the management and experience essential for the position. Accordingly, if the Texas Adjutant General's Department had complied with the DODD 1100.9 (Sept. 8, 1971) and DODD 140005 (March 21, 1983), Ms. Meister as a civilian should have been appointed to the position of State Schools Program Manager.

The applicable law, the foregoing Department of Defense Directives and army regulations, required that the position be converted to a civilian position upon the transfer of SGM. Andrews, especially considering that Ms. Meister was a civilian qualified to perform the duties of the State Schools Program Manager. *See* AR570-4, 3.27Dd(1) and (3) (September 25, 1989), Failure to reclassify the position when it became possible to do so was a violation of the Department of Defense directives and regulations, discussed *supra.* This failure to make the required change effectively deprived Ms. Meister of the opportunity to apply for the position, in retaliation for her complaint of discrimination.

III. The Questions presented are Important.

The questions presented are important. This writ requests the Court to determine if and how Title VII should be applied in cases in which an allegation of discrimination is brought by a civilian employee against his/her military employer.

The outcome of this matter would affect the rights of employees of military departments through out the country. In addition, the outcome would affect the military departments and define and instruct as to the limits of their military discretion.

The outcome would also require a balancing between the interest of the military and the interest of the public in continuing the proper construction and application of 42 U.S.C. § 2000e to military departments, both state and federal.

Considering the widespread effect this decision will have, the Court should grant the writ to resolve the conflict between the United States Circuit Courts of Appeal and to provide a clear precedent on the applicability of Title VII to military departments.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED NOVEMBER 28, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50935

LINDA IRENE MEISTER,

Plaintiff-Appellant,

versus

TEXAS ADJUTANT GENERAL'S DEPARTMENT; DANIEL JAMES, III, Brigadier General, in his official capacity as Adjutant General of the State of Texas,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before JOLLY, SMITH and BARKSDALE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Linda Meister is a civilian state employee of the Texas Adjutant General's Office. She brought several Title VII claims related to her work, but the district court dismissed all of them. The district court concluded that her claims were "incident to military service" and held that they were non-

justiciable under *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). We conclude, however, that *Feres* is inapplicable to civilian jobs in the state military departments of Texas. Instead of applying *Feres*, the court should have dismissed one of Meister's claims for failure to allege a prima facie Title VII violation and evaluated the justiciability of the other two claims under *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). We therefore affirm the dismissal of the first claim and reverse and remand for a *Mindes* evaluation of the other two.

I

Since 1985, Linda Meister has worked as a full-time civilian state employee for the Texas Adjutant General's Department of the Texas National Guard. She also happens to have been a non-commissioned officer in the Texas Air National Guard, where her position was Information Management Craftsman.

Between 1993 and the end of 1996, Meister's civilian position fell within the general category of Administrative Technician. Her specific title was "Assistant Schools Program Manager" for the Texas Army National Guard. Meister's job was to assist the Schools Program Manager, Sgt. Major Glen Andrews, an active duty member of the Texas Army National Guard. The Schools Program Manager has various responsibilities, including scheduling and coordinating attendance at U.S. Army training programs by members of the Texas Army National Guard.

Appendix A

Meister has alleged that Andrews subjected her to a hostile work environment, although this is not the basis of her claims here. She filed a grievance concerning Andrews's behavior in October 1994, which led to an investigation. Four months after the completion of that investigation, Andrews was transferred to another department.

Andrews's transfer vacated the position of Schools Program Manager. This position, however, was designated as a "federal" position. This designation requires that the position be filled only by an active member of the military service. Meister asked that the position be redesignated as a "state" position, which would have allowed her to hold the post as a civilian. This request was denied in early 1996, and an active-duty National Guard member was hired instead.

In December 1996, Meister was transferred to Assistant Personnel Manager in the Texas Air National Guard Division. Meister had not asked for the transfer and was unhappy about it. The new position involved the management and coordination of Texas Air National Guard military personnel. Meister's duties in this job were the same as or similar to her duties as a non-commissioned officer in the Texas Air National Guard. As with Meister's job as Assistant Schools Program Manager, active military service was not a prerequisite.

One year after her transfer, in December 1997, Meister filed suit against the Texas Adjutant General's Department and the Adjutant General of the State of Texas, Brigadier General Daniel James, III, in his official capacity. Meister claimed sexual harassment and discrimination in violation

of 42 U.S.C. § 2000e ("Title VII") and the Texas Commission on Human Rights Act ("TCHRA"). Specifically, she complained of the denial of a promotion to Schools Program Manager and of her transfer to the position of Assistant Military Personnel Officer.

In February 1998, Meister applied for the position of State Human Resources Manager, Program Administrator IV. This position involved the management and coordination of the state personnel functions of the Adjutant General's Department. Active military service was not a requirement, but Meister never received an interview, and someone else was hired for the job.

In March 1998, the defendants answered Meister's complaint and moved to dismiss the state law claims on the grounds of Eleventh Amendment immunity. The court granted this motion in June 1998.

In November 1998, Meister amended her complaint, adding a Title VII retaliation claim. Meister alleged that she "was denied promotion, harassed, and laterally transferred" because she had complained of unlawful discrimination. This version of the complaint is the one that is relevant to this appeal, and it raises claims with respect to the following:

(1) the defendants' failure to promote Meister to the Schools Program Manager position;

(2) Meister's involuntary transfer to the position of Assistant Air Personnel Manager; and

(3) the defendants' failure to promote Meister to State Human Resource Manager.

The defendants filed two motions to dismiss. The first, which was also a motion for summary judgment in the alternative, asserted that the claims were not justiciable under *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). In *Feres*, the Supreme Court had held that military servicemen could not bring claims against the federal government under the Federal Tort Claims Act. The second motion addressed the merits. On August 2, 1999, the two motions were referred to a magistrate judge. He issued his report and recommendation on August 17 that the first motion to dismiss be granted, and that the summary judgment motion be denied. In reaching this conclusion, the magistrate judge considered evidence beyond the pleadings. The second motion, to dismiss on the merits, was not mentioned.

On August 27, 1999, Meister filed the following two objections to the magistrate judge's report: (1) that the report failed to address the denial of promotion to the State Human Resources Director position; and (2) that the magistrate judge failed to analyze justiciability under *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

After reviewing the case *de novo*, the district court issued an order on August 31, 1999, approving and accepting the magistrate judge's report and granting the defendants' motion to dismiss. Meister then filed this appeal.

Appendix A

II

A

We will review the dismissal in this case as a summary judgment determination. Under Federal Rule of Civil Procedure 12(b), a district court may treat a 12(b)(6) motion to dismiss as a summary judgment motion by considering material outside the pleadings. That is what the magistrate and district court judges did here. We review a grant of summary judgment *de novo*. *Threadgill v. Prudential Securities Group, Inc.*, 145 F.3d 286, 292 (5th Cir. 1998).

B

We begin by observing that the plain language of Title VII allows civilian employees of state National Guard units to bring suit against their employers.[1] The question in this

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1. The Texas Adjutant General's Department urges the court to consider the close analogy between federal and state military departments. It is true, of course, that the United States armed forces are not generally subject to Title VII's anti-discrimination provisions, but we do not consider this relevant. First, the United States armed forces are not covered by Title VII because the United States is excluded from the statutory definition of "employer." *See* 42 U.S.C. § 2000e(b). In this case, Meister is an employee of a state agency, and Title VII's definition of "employer" would apparently include state governments. *Id.* Second, even if we were to treat federal and state military departments in the same manner, we would note that Title VII allows civilian employees in federal military departments to bring suit against the government employer. *See Hodge v. Dalton*, 107 F.3d 705, 708 (9th Cir. 1997) (§ 2000e-16 applies to (Cont'd)

case, however, is not whether Title VII provides Meister a cause of action but whether the federal courts are permitted to review the military's decision and to grant relief in this case. The issue, in other words, is simply whether Meister's claims are *justiciable*.

C

(1)

The first issue before us is whether the district court was correct in analyzing justiciability under *Feres*. The magistrate judge's report, which the district court adopted in full, asked whether the acts forming the basis of Meister's complaint were "incident to service in the military." *See United States v. Stanley*, 483 U.S. 669, 681, 107 S.Ct. 3054, 3064, 97 L.Ed.2d 550 (1987) (quoting *Feres*, 340 U.S. at 146, 71 S.Ct. at 159). The report first applied this test to Meister's claim concerning the denial of promotion to Schools Program Manager. The magistrate judge recognized that this position has a "tremendous effect on military careers because it determines military occupational specialties" and controlled training, thereby determining promotability of individual soldiers. For these reasons, the defendants' "command decision" to maintain this requirement of active military

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(Cont'd)
non-uniformed employees). Although this provision is not directly applicable in the present case because the statutory definition of "military departments" excludes the state National Guards, *see* 5 U.S.C. § 102, the protection afforded to federal civilian employees may be further indication that civilian employees of National Guard units are also protected.

service was one "integrally related to the military's unique structure." Thus, the matter of Meister's promotion was not justiciable.

As for Meister's involuntary transfer claim, the magistrate judge found that Meister's new position as Assistant Military Personnel Officer "involve[d] management and coordination" of military activities. Moreover, Meister's supervisor was an active member of the military. Thus, the magistrate judge concluded that Meister's civilian position was "inextricably intertwined" with the National Guard's military mission and was therefore nonjusticiable.

The magistrate judge did not specifically analyze Meister's third claim — retaliation in denying her an opportunity to compete for the State Human Resources Manager position. But, as the district court pointed out, the magistrate judge concluded that all three of Meister's claims relate to personnel decisions that are "inextricably intertwined" with the unique structure of the Texas National Guard.[2]

(2)

Before we can evaluate the district court's analysis, we need to determine the standard of review. The defendants contend that Meister failed to object specifically to the

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2. In conducting its *de novo* review, the district court considered the third claim in more detail and concluded that the position of Assistant Military Personnel Officer, "which exists solely to manage the state personnel functions of the Adjutant General's Department and which is a hybrid state/federal/military position is 'integrally related to the military's unique structure' " and is within the scope of *Feres*.

magistrate judge's reliance on *Feres*. That would normally limit our review to one for plain error. *Douglass v. United Services Automobile Assoc* , 79 F.3d 1415, 1428-29 (5th Cir. 1996) (*en banc*). But when the district court has engaged in *de novo* review, we do not require these specific objections to the magistrate judge's report as a prerequisite to full review. *See Douglass*, 79 F.3d at 1429. In the present case, the district court engaged in such a *de novo* review. We therefore will not impose this objection requirement here and will instead address this legal issue *de novo*.

(3)

A first step in analyzing the applicability of *Feres* is to review that case and its progeny. The holding in *Feres* itself is actually quite narrow. In that case, three claimants brought negligence suits against the United States armed forces on behalf of deceased servicemen. The issue before the Court was whether these suits could proceed under the Federal Tort Claims Act. The Court explained that the FTCA's impact was limited — it merely waived immunity, putting the United States government in the same position as any other defendant. The FTCA had not created a new cause of action. Thus, the government only faced liability "to the same extent as a private individual under like circumstances." *Feres*, 340 U.S. at 141, 71 S.Ct. at 157.

In analyzing whether analogous liability would exist under federal law[3] between private individuals, the Court

3. Though the suits were state law negligence suits, the Court concluded that federal law applied to suits concerning the relationship between the government and its soldiers. *Feres*, 340 U.S. at 143-44, 71 S.Ct. at 158.

focused on the plaintiffs' relationship to the defendant, not the nature of the claim itself. In other words, the Court tried to find a private plaintiff-defendant relationship analogous to the soldier-superior relationship. The Court did not, however, seek a federal analogue to state negligence law.

Ultimately, the Court concluded that there was no private relationship similar to that between soldier and government. Thus, the plaintiffs had failed to establish "liability of a 'private individual' even remotely analogous" to that being asserted by the plaintiffs. *Id.*, 340 U.S. at 141, 71 S.Ct. at 157. As a result, soldiers could not recover for injuries that "ar[ose] out of or were in the course of activity incident to service." *Id.*, 340 U.S. at 146, 71 S.Ct. at 159.

Little was done with *Feres* until *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). By that time, a new cause of action had been formulated by the courts — a *Bivens* suit for violations of constitutional rights. Thus, the Court did not need to consider available state law provisions and could instead evaluate the defendant's conduct for constitutional violations. The plaintiffs were seeking redress for discrimination in duty assignments and performance evaluations. But the Court rejected their claim despite the existence of *Bivens*:

> The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.

Id., 462 U.S. at 304, 103 S.Ct. at 2367. The Court also explained that the Constitution granted Congress plenary authority to regulate military life, and that Congress had done so by setting up a judicial system separate from Article III courts. *Id.*, 462 U.S. at 302, 103 S.Ct. at 2366-67. This suggested that the courts lacked the constitutional foundation to enter this field in the absence of Congressional imprimatur. Taking these factors into consideration, the Court concluded that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." *Id.*, 462 U.S. at 305, 103 S.Ct. at 2368.

The Court extended this principle to non-constitutional claims in *United States v. Shearer*, 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985), where the plaintiff was the administratrix of an army private who had been murdered by another serviceman. The private had been off-base and off-duty at the time. The plaintiff asserted that the Army had been negligent in failing to exert control over the murderer. The Court rejected this claim as well, citing *Feres* and *Chappell*, and noting that allowing the claim to proceed would involve the courts in military management, evaluating "basic choices about discipline, supervision, and control of a serviceman." *Id.*, 473 U.S. at 58, 105 S.Ct. at 3043.

In *United States v. Stanley*, 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987), the Court reestablished the importance of the "incident-to-service test," first promulgated in *Feres*. The plaintiff was a former serviceman. During his tour of duty, the military had given him LSD as part of an experiment into the drug's effects. He argued that the *Feres*

principle against allowing his *Bivens* claims to proceed was limited to suits by a subordinate against a superior officer. Those would be the only cases where judicial involvement would interfere with military discipline. But the Court was concerned that if this were the test, judicial inquiry into the extent that particular decisions involved military discipline would interject the judiciary into the very role it was trying to avoid — military management. The Court therefore rejected all claims that "arise out of or are in the course of activity incident to [military] service." *Id.*, 483 U.S. at 684, 107 S.Ct. at 3064. Its reason for choosing this simple test was that it "provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters." *Id.*, 483 U.S. at 683, 107 S.Ct. at 3063.

Although several circuits, including ours, have applied *Feres* to cases involving plaintiffs who were not members of the federal armed services, these extensions of the doctrine have been extremely limited. In *Crawford v. Texas Army National Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986), we applied *Feres* to §§ 1983 and 1985 claims brought by members of the Texas National Guard. Doing otherwise would have involved the courts in military management. *See also*, *Jorden v. National Guard Bureau*, 799 F.2d 99, 106 (3d Cir. 1986) (claim by state national guard member non-justiciable); *Brown v. United States*, 739 F.2d 362, 366-67 (8th Cir. 1984) (same); *Martelon v. Temple*, 747 F.2d 1348, 1350-51 (10th Cir. 1984) (same).

Similarly, some circuits have extended the *Feres* non-justiciability doctrine to Title VII and other claims brought by civilian National Guard Technicians. *Mier v. Owens*,

57 F.3d 747, 750 (9th Cir. 1995); *Wright v. Park*, 5 F.3d 586, 589 (1st Cir. 1993); *Wood v. United States*, 968 F.2d 738, 739 (8th Cir. 1992). The National Guard Technician Act created this special type of position with the military, allowing civilians to serve military functions, but requiring those civilians to be members of the National Guard. 32 U.S.C. § 709(b). Thus, the special hybrid civilian-military nature of these technicians warranted application of *Feres*. *Mier*, 57 F.3d at 750; *Wright*, 5 F.3d at 589; *Wood*, 968 F.2d at 739.

(4)

The lesson we draw from these cases is this: Applicability of *Feres*'s incident-to-service test depends upon the relationship between the plaintiff and the government. The Court made that clear in *Feres*, and subsequent decisions, especially *Chappell*, have explained why this relationship is critical — courts should not interfere with military discipline and management. These are areas where we have little competence or authority to proceed. The circuits that have extended *Feres*'s incident-to-service test beyond claims brought by plaintiffs in the federal armed services have done so in limited and analogous circumstances. Military discipline is equally important in the state national guards. The same is also true with respect to the unique role of national guard technicians. We are aware of no decisions, however, extending the test beyond these limited circumstances.

In the present case, Meister's jobs as Assistant Schools Program Manager and Assistant Personnel Manager were

civilian assignments. She was not subject to military discipline or the military hierarchy. She could quit whenever she wanted. The fact that she happened to work for the Adjutant General's office did not render those roles the same as roles in the military services.[4] For that reason, we conclude that the district court's rejection of Meister's claims based upon the incident-to-service test was erroneous.

D

Our conclusion that *Feres* is inapplicable does not necessarily mean that Meister's claims may proceed. First, it is well-settled that we will not reverse a judgment of the district court if it can be affirmed on any legally sufficient ground, even one not relied upon by the district court. *United States v. Real Property Located at 14301 Gateway Blvd. West, El Paso County, Texas*, 123 F.3d 312, 313 (5th Cir. 1997). Second, Meister's claims may still be non-justiciable under other judicially-created doctrines besides Feres. We turn now to Meister's claims.

(1)

We begin with Meister's first claim, that the defendants improperly failed to promote her to the Schools Program Manager position.

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4. The fact that Meister happened to be a non-commissioned officer in the Texas Air National Guard is coincidental and irrelevant to the issues before us. She was not required to be in the National Guard to hold either the Assistant Schools Program Manager job or the Assistant Personnel Manager job. And she is suing based on her experiences in those civilian jobs, not as a member of the National Guard.

This claim fails because Meister has failed to establish a prima facie case of discrimination. One of the elements of a prima facie case that a plaintiff must establish is that he or she was qualified for the position sought. *Haynes v. Pennzoil Co.*, 207 F.3d 296, 300-01 (5th Cir. 2000). But Meister does not contest that the Schools Program Manager position was designated a "federal" position, and that this designation meant that active military service was a prerequisite for the job. Nor does Meister contest that she was not an active member of the service. The defendants had no obligation to alter the qualifications on her behalf. Thus, her first claim fails.

(2)

With respect to her other two claims, Meister must contend with another judicial abstention doctrine, this one from *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). These claims challenge Meister's involuntary transfer to Assistant Air Personnel Manager and the rejection of her application to the position of State Human Resource Manager.

In *Mindes*, the plaintiff had been moved from active to reserve status based on alleged errors in a performance report. We explained that civilian courts must hesitate in reviewing "internal military affairs" like this one. *Id.* at 201. We therefore formulated a test to determine whether such issues would be justiciable in a particular case. As a threshold matter, the court must determine that the following two prerequisites to justiciability are met:

(1) The plaintiff has alleged a deprivation of constitutional rights or that the military violated statutes or its own regulations; and

(2) Exhaustion of intra-service measures.

Mindes, 453 F.2d at 201. If both criteria are met, then we weigh four factors in considering whether the issue is justiciable:

(1) The nature and strength of the plaintiff's challenge. Constitutional claims are normally more important than those with a statutory or regulatory base;

(2) The potential injury to the plaintiff if review is refused;

(3) The type and degree of anticipated interference with the military function; and

(4) The extent to which the exercise of military expertise or discretion is involved.

Id. at 201-02.

(3)

There are two threshold issues we must address before we can consider the application of *Mindes* to Meister's two remaining claims. First, we must determine whether *Mindes* ever applies to claims by a civilian plaintiff. Second, we must consider whether *Mindes* is still viable in the face of supervening precedent.

Appendix A

(a)

Existing case law provides no clear answer to whether *Mindes* applies to claims by non-military personnel. Two district courts have utilized a *Mindes* analysis in this situation, though they did so without discussing the plaintiff's non-military status. *Malone v. United States*, 61 F.Supp.2d 1372, 1381-82 (S.D. Ga. 1999); *Professional Helicopter Pilots Assoc. v. Carlucci*, 731 F.Supp. 440, 446-48 (M.D. Ala. 1990). The only other decisions on this point come from the Ninth Circuit, and they contradict each other. In *Khalsa v. Weinberger*, 779 F.2d 1393 (9th Cir. 1985), *adhered to*, 787 F.2d 1288 (9th Cir. 1985), the plaintiff was a member of the Sikh religion who brought an action against the army for refusing to process his enlistment application because he could not comply with army appearance regulations. Though the plaintiff in that case was a civilian, the Ninth Circuit held that the issue still involved "internal military decisions" and therefore required analysis under *Mindes* to determine justiciability:

> [I]f regulations governing soldiers' appearance are not "internal," then no Army regulations are internal. Almost any regulation may cause a particularly sensitive civilian to decide that he or she could not take the statutory enlistment oath to follow all orders.

Id. at 1397. But in *Bledsoe v. Webb*, 839 F.2d 1357, 1360 (9th Cir. 1988), that same circuit held that *Mindes* did not apply to a claim by a female civilian asserting that the Navy violated Title VII by denying her access to a naval vessel based on her sex.

We find the *Khalsa* analysis more convincing. Whether the plaintiff is a civilian or a serviceman does not affect whether the issue we are reviewing qualifies as an "internal military decision." Some decisions, by their nature, are inherently military, regardless of who the plaintiff is. Thus, we will not forestall the application of *Mindes* simply because Meister is suing as a civilian.

(b)

There is also some confusion as to *Mindes*'s continued viability. In *Wright v. Park*, 5 F.3d 586, 590-91 (1st Cir. 1993), the First Circuit interpreted the breadth of the rule in *Stanley* to preempt *Mindes*. Other circuits have continued to apply the *Mindes* doctrine, however. *See, e.g., Guerra v. Scruggs*, 942 F.2d 270, 275 (4th Cir. 1991); *Watkins v. United States Army*, 875 F.2d 699, 705 (9th Cir. 1989) (*en banc*). The Tenth Circuit relied on *Mindes* in *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981), and a recent unpublished decision from that circuit suggests that the doctrine still has force there. *See Robertson v. United States*, 1998 WL 223159 at *2-3 (10th Cir. 1998). *See also Saum v. Widnall*, 912 F.Supp. 1384, 1396 (D. Col. 1996) (applying *Mindes*). In 1993, the Seventh Circuit demonstrated its belief that *Mindes* had survived *Stanley* by rejecting *Mindes* on other grounds. *See Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 768 (7th Cir. 1993).[5]

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5. The Seventh Circuit panel held that *Mindes* "erroneously 'intertwine[d] the concept of justiciability with the standards to be applied to the merits of the case.' " *Knutson*, 995 F.2d at 768 (citation omitted).

Our own circuit has not discussed *Mindes* since *NeSmith v. Fulton*, 615 F.2d 196, 201 (5th Cir. 1980), which has led two district courts within the circuit to opine on its continued viability. In *Udell v. Adjutant General's Dept. of Texas*, 878 F.Supp. 991, 994 (S.D. Tex. 1995), the court concluded that we had abandoned *Mindes* in favor of *Chappell* in *Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th Cir. 1986). And in *Hassenfratz v. Garner*, 911 F.Supp. 235, 237 (S.D. Miss. 1995), a Mississippi district court agreed with the First Circuit's conclusion that *Stanley* preempted *Mindes*.

We disagree with both district courts. First, *Crawford* did not overturn *Mindes*. The question in that case was whether *Chappell* barred the National Guardsmen's §§ 1983 and 1985 claims. We concluded that the case did. But we noted that the First Circuit, which had interpreted *Chappell* more narrowly, had relied on *Mindes*. We did not express any disapproval with this conclusion, which suggests that the *Crawford* panel believed *Mindes* still had some force.

Second, we do not believe that *Stanley* entirely preempted *Mindes*. It is true that *Stanley* blocks claims brought by servicemen incident to their military service, which therefore preempts *Mindes* with respect to such claims. But claims still fall within *Mindes* that *Stanley* does not encompass — those involving "internal military decisions" that are not "incident to [a serviceman's] military service." The question before us, therefore, is whether Meister's second two claims concern "internal military decisions."

(4)

The record before us was not developed with an eye to *Mindes*. We are therefore unable to determine whether transferring Meister and hiring someone else for the State Human Resource Manager position were "internal military decisions." This necessitates a remand. If the district court determines that the decisions were of this type, then the court should evaluate the justiciability of these two claims under *Mindes*. We ultimately leave this determination to the district court.

All we hold today is that there may be some civilian positions that are so intertwined with the operation of the military that courts lack the competence to evaluate hiring and firing. Such decisions may be "internal to the military," and a *Mindes* analysis is required before proceeding further.

III

For the reasons stated herein, the district court judgment is

AFFIRMED in part, REVERSED and REMANDED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50935
D.C. Docket No. A-97-CV-941

LINDA IRENE MEISTER

Plaintiff – Appellant

v.

TEXAS ADJUTANT GENERAL'S DEPARTMENT; DANIEL JAMES, III, Brigadier General, in his official capacity as Adjutant General of the State of Texas

Defendants – Appellees

Appeal from the United States District Court for the Western District of Texas

Before JOLLY, SMITH and BARKSDALE, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

APPENDIX B — REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION DATED AND FILED AUGUST 17, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

CIVIL NO. A-97-CA-941-JN

LINDA IRENE MEISTER

V.

TEXAS ADJUTANT GENERALS DEPARTMENT, ET AL.

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

The Magistrate Court submits this Report and Recommendation to the United States District Court pursuant to 28 U.S.C. §636(b) and Rule 1 of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges, as amended, effective January 1, 1994.

Appendix B

Before the Court is Defendants' Motion to Dismiss filed on May 26, 1999 (Clerk's Docket No. 31). The Plaintiff filed a Response on June 9, 1999 (Clerk's Docket No. 33). Defendants filed a Reply on July 12, 1999 (Clerk's Docket No. 45). Also before the Court is the Defendant's Motion for Summary Judgment filed on June 16, 1999 (Clerk's Docket No. 39). Plaintiff filed a Response on July 6, 1999 (Clerk's Docket No. 40). Defendant filed a Reply on July 29, 1999. (Clerk's Docket No.).

I. GENERAL BACKGROUND

Plaintiff Linda Meister ("Plaintiff") began her employment with the Texas Adjutant Generals Department ("Department") on October 1, 1985, as a full-time civilian state employee at the Headquarters of the Texas Air National Guard ("TANG"), located at Camp Mabry, Texas. In addition to her civilian employment, Plaintiff is also employed as a non-commissioned officer in TANG and has been assigned as an Information Management Craftsman. Plaintiff's job duties are identical for her civilian and military reserve positions.[1]

With regard to her civilian employment with TANG, Plaintiff occupied the position of Administrative Technician ("Assistant School Manager") between 1993 and 1997. Plaintiff's job duties entailed assisting the Schools Manager, Sgt. Major Glen Andrews[2], who was responsible for

1. Although Plaintiff claims the jobs are different on paper, she testified in her deposition that she performs the same duties for both jobs.

2. Sgt. Andrews is an active duty member of the TANG.

scheduling and coordinating the attendance of TANG soldiers at various schools and training courses provided by the United States Army. Plaintiff claims that Sgt. Andrews "harassed" Plaintiff because of her gender and subjected her to a hostile work environment.[3] Plaintiff alleges that the harassment consisted of Sgt. Andrews failing to grant her request for paid leave and his alleged practice of communicating with Plaintiff through written notes instead of speaking to her directly.

Plaintiff alleges that in 1996, Defendants began to retaliate against her because she had filed two internal grievances with the Adjutant General's Department in 1994[4] and 1995.[5] Specifically, Plaintiff claims that in May 1996, she was denied a promotion from Assistant State Schools Program Manager/Administrative Technician II to State Schools Program Manager. Plaintiff alleges that she was further retaliated against on December 12, 1996, when she was laterally transferred from her position as Assistant Schools Program Manager to the position of Deputy Director

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3. Plaintiff is not alleging that she subjected to sexual harassment, i.e. that she was ever the victim of inappropriate sexual remarks or conduct.

4. On October 31, 1994, Plaintiff filed a formal grievance with the Texas Adjutant General's Department complaining that her request to have her job reclassified to an Administrative Technician III had been denied.

5. Plaintiff filed a grievance with the Department in 1995 because Sgt. Andrews denied Plaintiff's request for paid leave.

of Military Personnel at TANG.[6] Plaintiff alleges that she was transferred because she had filed a sex discrimination charge with the Texas Commission on Human Rights July 3, 1996. Plaintiff further alleges that she was denied the opportunity to compete for a promotion to the State Human Resource Manager position in March 1998, in retaliation for filing this lawsuit.

Plaintiff brought this action on December 30, 1997, against the Department and the Adjutant General of the State of Texas, Brigadier General Daniel James III, in his official capacity, claiming that she was harassed because of her sex, discrimination and retaliation in violation of 42 U.S.C. § 2000e ("Title VII").

II. ISSUE PRESENTED

Whether Plaintiff is precluded from maintaining a Title VII cause of action against Adjutant General's Office under the *Feres* Doctrine.

III. STANDARD OF REVIEW

A. Motion to Dismiss

When considering a motion to dismiss under Federal Rule 12(b)(6) the court must take the factual allegations of

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6. Plaintiff has continued to occupy the position of Deputy Director of Military Personnel since her transfer in January 1997. Plaintiff's job duties entail managing and coordinating the military personnel of TANG. Plaintiff's supervisor is an active duty member of TANG. Plaintiff has received a commensurate promotion and two merit raises since January 1997.

the complaint as true and resolve any ambiguities or doubts regarding the sufficiently of the claim in favor of the plaintiff. *Jefferson v. Lead Industries Ass'n, Inc.*, 106 F.3d 1245, 1250 (5th Cir. 1997). The complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of her claim that would entitle her to relief. *Id.*; *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994). However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. *Jefferson*, 106 F.3d at 1250; *Fernandez-Montes v. Allied Pilots Ass'n.*, 987 F.2d 278, 284 (5th Cir. 1993).

B. Motion for Summary Judgment

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The party seeking summary judgment bears the burden of showing that there is an absence of evidence to support the non-movant's case. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553-54 (1986); *Coleman v. Houston Independent School District*, 113 F.3d 528, 533 (5th Cir. 1997). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986).

The Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in her favor.

Coleman, 113 F.3d at 533. If the non-movant sets forth specific facts in support of allegations essential to her claim, a genuine issue of material fact is presented, and summary judgment is inappropriate. Unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a proper motion for summary judgment. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) (citing *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. at 2509-10)). Rather, the nonmoving party must set forth specific facts showing the existence of a "genuine" issue concerning every essential component of its case. *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997). The standard of review "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986)).

IV. *ANALYSIS*

A. Status of Adjutant General's Department

Pursuant to the National Defense Act of 1916, the National Guard is "to be uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards and capable of being 'federalized' soldiers." *Holdiness v. Stroud*, 808 F.2d 417, 420-21 (5th Cir. 1991). Congress also authorized the allocation of federal equipment to the Guard, and provided federal compensation for Guard

members, supplementing any state emoluments. *Id.* at 421. Thus, the Guard is a hybrid state-federal organization, in which the Governor remains in charge of the National Guard in each state except when the Guard is called into active federal service. *Id.* "The National Guard is today, therefore, an integral part of this country's military structure. It is '[a]n essential reserve component of the Armed Forces of the United States, available with regular forces in time of war.' " *Id.* (quoting *Gilligan v. Morgan*, 93 S.Ct. 2440, 2444 (1973)).

In most states, including Texas, the Governor administers the National Guard through the State Adjutant General. *Id.* In Texas, the Adjutant General is a member of the military staff of the Governor and is the head of the Adjutant General's Department. TEX. GOV' CODE §§ 431.003, 431.022. It is the duty of the Adjutant General to control and manage the state military forces, including the Texas National Guard. TEX. GOV' CODE §§ 431.001, 431.022.

B. *Feres* Doctrine

In *Feres v. United States*, 71 S.Ct. 153, 159 (1950), the Supreme Court held that members of the armed services could not sue the Government for injuries that "arise out or are in the course of activity incident to service." The *Feres* doctrine has been interpreted broadly by courts. "[P]ractically any suit that implicates the military judgments and decisions' . . . runs the risk of colliding with *Feres*." *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991) (quoting *United States v. Jonhson*, 107 S.Ct. 2063, 2069 (1987)). In *Chappell v. Wallace*, 103 S.Ct. 2362 (1983), the Supreme Court held

that enlisted military personnel may not pursue *Bivens*-type suits to recover damages for violations of their constitutional right to equal protection as a result of discrimination against them because of their race. The Court reasoned the following:

> The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. The special nature of military life — the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel — would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. Here, as in *Feres*, we must be "concern[ed] with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." *Id.* at 2367 (citations omitted).

The Supreme Court further expanded *Feres* in *United States v. Stanley*, 107 S.Ct. 3054, 3062 (1987), holding that the *Chappell* approach applies to all activities performed "incident to service" and not merely to activities performed within the officer/subordinate relationship.

Other Circuits have expanded the *Feres* doctrine in holding that Title VII does not apply to uniformed members of the armed services. *Hodge v. Dalton*, 107 F.3d 705, 709

(9th Cir.) (finding that active-duty marine corps member who had filed a racial discrimination complaint was excluded from coverage under Title VII), *cert. denied*, 118 S.Ct. 62 (1997); *Roper v. Dep't of Army*, 832 F.2d 247, 248 (2d Cir. 1987) (barring army reserve member's claim that she was not promoted due to racial and sexual discrimination); *Stinson v. Hornsby*, 821 F.2d 1537, 1541 (11th Cir. 1987) (barring national guard member's claim that his discharge was due to racial discrimination), *cert. denied*, 109 S.Ct. 402 (1988); *Taylor v. Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981) (barring national guard member's claim that she was demoted due to racial discrimination).

The *Feres* doctrine has also been applied to suits by National Guard members. For example, in *Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th Cir. 1986), the Fifth Circuit held that § 1983 does not afford a cause of action against Texas National Guard personnel for their service-connected actions. See also *Stroud*, 808 F.2d at (holding that § 1983 does not afford cause of action against national guard personnel for their service-connected actions in allegedly violating national guard member's federal constitutional and statutory rights when guard member was involuntarily discharged from national guard and from his employment as civil technician); *Udell v. Adjutant General Dep't of the State of Texas*, 878 F.Supp. 991 (S.D. Tex. 1995) (finding that claims by retired Texas Air National Guard against his superior officers, alleging retaliation under Texas Whistleblower Act, and Texas Commission on Human Rights Act, libel and violations of state constitutional rights were incident to service with National Guard and thus were nonjusticiable in federal district court).

Appendix B

Courts have further expanded the *Feres* doctrine to cover civilian technicians in the National Guard. National Guard technicians are federal civilian employees who are also required to be members of the National Guard. Thus, National "Guard technicians are in a hybrid position which combines both military and civilian aspects." *Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir. 1998). In *Nesmith v. Fulton*, 615 F.2d 196 (5th Cir. 1980), the Fifth Circuit held that a suit by a National Guard technician based on his dismissal from his job was nonjusticiable because it involved a military matter. The Fifth Circuit reasoned that "[f]ormally, a civilian technician is a federal civil employee outside the competitive civil service. In substance, however, the position is one in a military organization." Id. at 201; See also, *Hassenfratz v. Garner*, 911 F.Supp. 235 (S.D. Miss. 1995) (holding that civilian technician's complaint alleging that his discharge violated his constitutional rights was nonjusticiable because it implicated personnel matters directly related to military readiness of the Guard). Similarly, in *Wright v. Park*, 5 F.3d 586 (1st Cir. 1993), the First Circuit held that dismissed National Guard technician's § 1983 employment action against military officers in chain of command was nonjusticiable. The court reasoned that National Guard technicians are indispensable to the nation's defense because "technicians serve as the Guard's support staff and are, in fact those whose job it is to maintain and assure the Guard's strength and organization." *Id.* at 588. The Court ruled the following:

> [W]hile a technician's job is a composite, containing both civilian and military pieces, the job's dual aspects are inseparable; they are, like Chang and

> Eng, joined at the chest. And from the fact that the technician's several roles are inextricably intertwined, it follows that the adverse employment action against which appellant inveighs necessarily implicates his military as well as his civilian status.

Id. at 589.

Courts have further held that civilian technician's claims under Title VII implicate military concerns that are nonjusticiable in civilian courts. In *Hupp v. United States Dep't of Army*, 144 F.3d 1144 (8th Cir. 1998), the Eighth Circuit held that National Guard member's Title VII action alleging that she was denied civilian technician position because of her gender was nonjusticiable pursuant to the *Feres* doctrine. The court determined that the Title VII action was nonjusticiable because the hiring process at issue in the case involved the assessment of the plaintiff's civilian and military qualifications. Similarly, the Ninth Circuit has held that "Title VII applies to Guard technicians except when they challenge personnel decisions integrally related to the military's unique structure." *Mier v. Owens*, 57 F.3d 747, 748 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1317 (1996).[7] Hence, the Ninth Circuit has held that decisions relating to

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7. But see *Bledsoe v. Webb*, 839 F.2d 1357, 1360 (9th Cir. 1988) (holding that Title VII claim challenging the refusal to allow a female civilian employee to embark on a Naval aircraft carrier was not so "inherently military" as to be nonjusticiable) and *Gregory*, 153 F.3d at 1074 (finding that Guard technician's hostile work environment claim based on sexual and racial harassment was not nonjusticiable).

the promotion or suspension of civilian employees of the National Guard are "integrally related to the military's unique structure." *Id.*; *Gregory*, 153 F.2d at 1074. Moreover, in *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986), the court held that a part-time major and full-time civilian flight instructor could not challenge his transfer to another base because it involved a nonjusticiable military decision.

C. Are Plaintiff's Claims Justiciable?

Defendants argue that Plaintiff's claims involve personnel matters that are inextricably intertwined with the conduct of the military mission of the Texas National Guard and therefore concern nonjusticiable miliary matters over which this Court lacks jurisdiction. Plaintiff insists that the *Feres* doctrine does not apply to her because her claims relate to her full-time civilian job, not to her military position. Plaintiff argues that her two positions with the National Guard are entirely two separate functions with distinct duties and responsibilities." Plaintiff emphasizes that unlike the position of National Guard technician, there is no requirement to be a member of the Texas Air National Guard in order to hold her full-time civilian position.

The Court's inquiry must focus on whether the acts which form the basis of a Plaintiff's complaint are "incident to service in the military." *Stanley*, 107 S.Ct. at 3062. Plaintiff's complaint alleges that she was unlawfully denied a promotion to the position of State Schools Program Manager. The School Program Manager position is a federally-funded job which is held by a full-time active duty

Sergeant Major in the National Guard.[8] The State Schools Manager position obligates federal funds and schedules individuals for military training. The position has a tremendous effect on military careers because it determines military occupational specialties and advanced individual training for both noncommissioned and commissioned officers, thereby determining their promotability. The Adjutant General and Chief of Staff of the Texas National Guard views the position of State Schools Manager as a "strictly military" position which would best be served by a Sergeant Major because of a Sergeant Major's experience and knowledge of military education programs. Defendants emphasize that Plaintiff was not qualified for the position of State Schools Manager because it was not a civilian position and she did have the requisite military qualifications to hold the position. Thus, the Defendants made a command decision to continue the Schools Program Manager position as a military position occupied by an active duty National Guard Sergeant Major. "Decisions regarding who is promoted and why are central to maintenance of the military's hierarchy." *Mier*, 57 F.3d at 749. The Court finds that the decision to continue the Manager position as a military one is "integrally related to the military's unique structure" and is therefore nonjusticiable.

Plaintiff further alleges that she was "involuntarily transferred" to the position of Assistant Military Personnel Officer for the Texas Air National Guard. This position

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8. The School Manager position had been previously held by Plaintiff's supervisor, Sgt. Glen Andrews, an active duty member of the Texas Army National Guard. In addition, Sgt. Andrews was ultimately replaced by another active duty soldier.

involves the management and coordination of Texas Air National Guard military personnel actions. Plaintiff is supervised by Colonel Jill Collins, who is an active duty member of the Guard. The Court finds that Plaintiff's civilian position is "inextricably intertwined" with the National Guard's military mission. Moreover, "transfer decisions go to the core of deployment of troops and overall strategies and preparedness" and are therefore nonjusticiable. *Sebra*, 801 F.2d at 1142.

Finally, it is important to emphasize that like civilian National Guard technicians, Plaintiff held a hybrid position which combined both military and civilian aspects. Plaintiff's current civilian position requires her to manage and coordinate Texas Air National Guard military personnel and is supervised by an active duty member of the National Guard. Moreover, Plaintiff has provided sworn deposition testimony that she performs identical job duties for her civilian and military positions and even sits at the same desk for both jobs.

The Court agrees with Defendants' argument that it is critical to the operation of the Texas National Guard that the Adjutant General is free to makes personnel decisions. The Court finds that all of Plaintiff's complaints relate to personnel decisions of the Texas National Guard that are "inextricably intertwined" with the unique structure of the National Guard.[9] The Court finds that entertaining Plaintiff's

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9. Plaintiff is not complaining about sexual harassment or other actions which could not be classified as "inherently military" decisions. See *Bledsoe*, 839 F.2d at 1360 and *Gregory*, 153 F.2d at 1074.

claims "would lead to the very type of congressionally uninvited intrusion into military affairs by the judiciary that the Supreme Court denounced in *Stanley*." *Udell*, 878 F.Supp. at 995. Accordingly, the Court finds that Plaintiff's claims are nonjusticiable. Therefore, the Magistrate Court RECOMMENDS that the District Court GRANT Defendants' Motion to Dismiss.

V. *RECOMMENDATION*

The Magistrate Court RECOMMENDS that the District Court GRANT Defendants' Motion to Dismiss (Clerk's Docket No. 31). The Court FURTHER RECOMMENDS to DENY Defendants' Motion for Summary Judgment (Clerk's Docket No. 39) and Motions to Strike (Docket No. 45 and 51) as MOOT.

IT IS FURTHER ORDERED that this case be removed from the Magistrate Court's docket and returned to the docket of the Honorable James R. Nowlin.

VI. *WARNINGS*

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

Appendix B

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within ten (10) days after the party is served with a copy of the Report shall bar that party from de novo review by the district court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-153, 106 S.Ct. 466, 472-74 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

The Clerk is ORDERED to mail each Party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED this the 17th day of August, 1999.

s/ Alan D. Albright
ALAN D ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION DATED, ENTERED AND FILED AUGUST 31, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-97-CA-941 JN

LINDA IRENE MEISTER,

VS.

TEXAS ADJUTANT GENERALS
DEPARTMENT, ET AL.

ORDER

Before the Court is the above entitled cause of action. This cause was referred to the United States Magistrate Judge for findings and recommendations pursuant to 28 U.S.C. § 636(b) and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. The Magistrate Judge filed his Report and Recommendation on August 17, 1999. Plaintiff filed Objections on August 27, 1999.

In light of the Objections, the Court has undertaken a *de novo* review of the entire case file in this cause and finds that the Report and Recommendation filed by the Magistrate Judge is correct and should be approved and accepted by the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the United States Magistrate Judge's Report

and Recommendation filed in this cause is APPROVED and ACCEPTED by this Court.

Plaintiff objects to the Report and Recommendation because it "appears to be a final disposition on the merits of this cause of action." The Court finds it is. Plaintiff objects that the Magistrate's Report and Recommendation did not address the issue of the State Human Resources Manager position which she claims she was denied the opportunity to compete for in retaliation for filing charges with the Texas Commission on Human Rights. The Court finds that any decision regarding this position, which exists solely to manage the state personnel functions of the Adjudant General's Department and which is a hybrid state/federal/military position, is "integrally related to the military's unique structure" and like the State Schools Manager position, nonjusticiable pursuant to the *Feres* doctrine. Also, the Court directs Plaintiff to Page 12 of the Report and Recommendation which clearly finds that "*all* of Plaintiff's complaints relate to personnel decisions of the Texas National Guard that are 'inextricably intertwined' with the unique structure of the Guard" [emphasis added].

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss is hereby GRANTED.

IT IS FURTHER ORDERED that this cause of action is CLOSED and that any remaining claims are hereby DENIED AS MOOT.

SIGNED AND ENTERED this 31st day of August, 1999.

s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX D — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 5, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50935

LINDA IRENE MEISTER

Plaintiff – Appellant

v.

TEXAS ADJUTANT GENERALS DEPARTMENT; DANIEL JAMES, III, Brigadier General, in his official capacity as Adjutant General of the State of Texas

Defendants – Appellees

Appeal from the United States District Court for the Western District of Texas, Austin

ON PETITION FOR REHEARING

Before JOLLY, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

s/ E. Grady Jolly
United States Circuit Judge